United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

74-1155

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA

VS.

RICHARD A. CEPULONIS

CASE NO. 74-1155

SUPPLEMENTAL BRIEF OF DEFENDANT,
RICHARD A. CEPULONIS

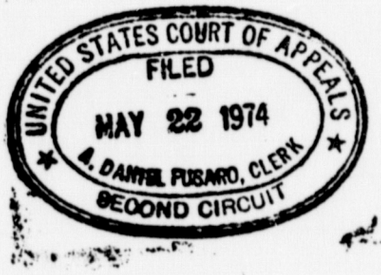

TABLE OF CASES CITED

STATUTES

CONSTITUTIONAL PROVISIONS

ARTICLES

Note, Warrantless Searches and Seizures of Automobiles, 87 Harvard Law Review 835 (1974).

STATEMENT OF FACTS:

Defendant was arrested late in the afternoon of September 15, 1973 by six (6) FBI Agents. The Agents had had defendant's Manhattan Motel room under surveillance, and arrested him as he approached the elevator located some Fifty (50) feet down the hall. (TR. 7,8). (Unless otherwise indicated, all references are to the October 26, 1974 transcript.) The arrest was made pursuant to a warrant for unlawful flight to avoid prosecution in Massachusetts (TR.6). Earlier in the day another man, Francis Lovell, had been arrested in connection with the same charges. (TR.8)

The Defendant was searched and handcuffed, and then led back down the hall to his room which the agents knew to be occupied at that time by the defendant's girlfriend and her fifteen (15) month old child. (TR.10). Acting without a warrant (TR.32) and their guns drawn, the agents obtained entry and proceeded to search the room. (TR.11) During this search, the agents found a suitcase which contained, among other items, a bandolier of machine gun bullets. (TR.14) The agents questioned the defendant regarding the whereabouts of the machine gun accompanying the ammunition. On further questioning at FBI headquarters, defendant responded that the machine guns might be found in a black Ford last seen by

the defendant at the Skyway Motel at LaGuardia Airport.

Acting on this information and on a bill of sale for a blue Ford found in defendant's wallet, together with a set of Ford keys taken from defendant, the agents proceeded to the airport in search of the car. Having located a car matching the bill of sale description, the agents searched the trunk and found two (2) machine guns wrapped in a sheet. (TR.18) Even though they had had the bill of sale with its description of the car , Ohio registration, and serial number since the afternoon of the previous day, (TR.19) the agents had made no attempt to obtain a warrant before searching the car.(TR.32)

The Defendant, Richard Allen Cepulonis, was charged with possession of a firearm which was not registered to him, in violation of 26 U.S.C. A. Section 5861 (d)(1974 Supp.) A hearing was held on October 26, 1973 on Defendant's Motion to Suppress in the Federal District Court for the Eastern District of New York. The charge rested solely on evidence obtained in the course of two (2) searches, both of which defendant claimed were unlawful. Defendant's Motion to Suppress the evidence was denied and he was convicted. The case is presently before the Court of Appeals for the Second Circuit on appeal from that conviction.

QUESTIONS ON APPEAL:

1. Did the Trial Court err in refusing to grant the Motion to Suppress evidence ....?

2. Were defendant's Fourth Amendment rights violated by the warrantless search of defendant's room, without his consent and not incident to his arrest ?

3. Were defendant's Fourth Amendment rights violated by the warrantless search of defendant's car, not incident to his arrest nor necessary to prevent the destruction or removal of incriminating evidence of a crime ?

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS EVIDENCE OBTAINED AS THE DIRECT RESULT OF AN UNLAWFUL SEARCH OF DEFENDANT'S ROOM.

A. Searches not pursuant to a warrant are *per se* unlawful under the Fourth Amendment unless they fall within a limited number or recognized exceptions.

1. The search of defendant's room was not within the exception for searches incident to a lawful arrest.

2. The search of defendant's room was not within the exception for consent searches.

B. The items found during this unlawful search led directly to the location of the evidence upon which defendant's conviction rests. That evidence is thus the tainted product of an unlawful search and its admission at trial was reversible error.

II. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE PRODUCED BY THE UNLAWFUL SEARCH OF DEFENDANT'S AUTOMOBILE.

A. The search of defendant's car without a warrant was unlawful because not made incident to his arrest.

B. The search of defendant's car was unlawful because it was not made necessary in order to prevent the removal of evidence and therefore was not within the automobile exceptions.

C. The evidence found in defendant's car was thus the product of an unlawful search and its admission at trial was reversible error.

ARGUMENT

I. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS EVIDENCE OBTAINED AS A DIRECT RESULT OF THE UNLAWFUL SEARCH OF DEFENDANT'S ROOM

A. Searches conducted without warrants are per se unlawful unless they fall within a limited number of recognized exceptions to this rule.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized". U.S. Constitution amend. IV. The general rule thus imposed has been stated to be that "searches conducted outside the judicial process, without the prior approval by judge or magistrate, are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions". Katz V. United States 389 U.S. 347, 357 (1967) (footnote omitted). Accord Schneckloth V. Bustamonte 412 U.S. 218, 93 S.Ct. 2041, 2043 (1973). The exceptions, generalli justified by the presence of exigent circumstances, include searches incident to a lawful arrest, by consent, of automobiles in certain circumstances, in hot pursuit of items in plain view, or in emergency circumstances. United States V. Mapp, 476 F.2d 67, 76 (2nd Cir. 1973). Since the search of defendant Cepulonis' room was

made without a warrant, it can be held lawful only if it fell within the scope of one of these exceptions. No evidence was adduced at the hearing to suggest ant any of these exceptions, apart from incident to arrest or consent, is applicable in the instant case.

1. The search of defendant's motel room was not made incident to his lawful arrest.

Chimel V. California, 395 U.S. 752 (1969) established the principle that a search incident to a lawful arrest must be limited to the area within the defendant's immediate control. The purposes of this exception are to protect the police from physical threat and to prevent the destruction of evidence. Thus, in Chimel, supra., a search of defendant's entire house was held unlawful because it extended beyond the room in which the arrest occurred. Similarly, in Vale V. Louisiana, 399 U.S. 30 (1970), a search of defendant's house was unalwful where the arrest itself occurred on the street outside. Accord Shipley V. California 395 U.S. 818 (1969).

In the instant case, the testimony is uncontroverted that the defendant Cepulonis was arrested in the motel corridor at least fifty (50) feet away from his room. Thus,it was physically impossible for the defendant himself unarmed, to have gotten past six (6) shorgun-bearing agents to the room in order to obtain a weapon or destroy evidence. A similar factual situation was held to exceed the

Chimel rule by this Court in Mapp, supra., at 79-80. The search of defendant's room was not, then, justified as incident to his arrest.

2. The search of Defendant's room was not made with the consent, express or implied, of defendant or Mary Tracy, co-occupant of the room.

Both defendant Cepulonis and Mary Tracy, the co-occupant of the motel room, testified that their permission for the search was not sought by the agents and that at no time did they give their consent. While the record is not completely clear on this point, their testimony is corroborated by an FBI report which recorded defendant's statement at the time as "no search". (TR.26)

Nor by their actions can either the defendant or Miss Tracy be understood to have given their consent to the search. In Mapp, supra., this court confronted the issue of implied consent in a case, which like the instant case, "present(ed) an instance of submission to official authority under circumstances pregnant with coercion", 476 F.2d at 77. In that case, an officer with gun in hand had charged into a bedroom, arrested its occupant, and demanded of her the location of a package of narcotics. She pointed to a closed closet in which the package was later found. In such circumstances, this Court held that the search was not made pursuant to consent

voluntarily given but was rather a classic instance of coerced acquiescence to police authority. No less coerced was the entry and subsequent search of defendant Cepulonis' room.

Knowing that the room was occupied by a woman and baby, the agents entered at gunpoint and proceeded to search. Under these circumstances neither the handcuffed defendant nor Miss Tracy were in any position actively to oppose the search. Thus, the search of defendant's room cannot be justified as having been made with his consent.

B. The items found during this unlawful search led directly to the location of the evidence on which the defendant's conviction rests. That evidence is thus the tainted product of an unlawful search and its suppression was required by the Fourth Amendment.

Where the evidence in question is the product of both legal and illegal leads, "(i)n this circuit the tendency has been to find any appreciable pollution sufficient to taint the fruit". United States V. Schipani, 289 F.Supp. 43,54 (E.D.N.Y. 1968) (Weinstein, J.). This court has stated that in such circumstances "a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure the tainted matter ... . The

test must be one of actualities, not possibilities". United States V. Parontian, 299 F.2d 486,489 (2nd Cir. 1962). Further, once the issue of tainted evidence is raised by the defendant, the government bears the burden of proving by a preponderance of the evidence that the challenged evidence was not obtained in violation of Fourth Amendment guarantees. Lego V. Twomey, 404 U.S. 477 (1972).

These principles were applied in Parontian, supra. In that case government agents in search of narcotics entered defendants' apartment without a warrant on two (2) occasions, during one of which a new cedar lining in a closet was called to their attention by the landlord's employee. Later, after defendants had been evicted, the agents returned with the landlord's permission and found a secret compartment containing narcotics in the closet lining. Although one of the agents claimed independent information concerning the secret cathe obtained subsequent to the illegal entries, this Court held that the government had failed to establish the absence of taint. 299 F.2d at 489 n.2.

Similarly, in the course of searching defendant Cepulonis' room, the agents unearthed a bandolier of mathine gun bullets. This ammunition represented the only solid evidence the agents had at that time which tied defendant Cepulonis to the present

possession of a machine gun. Immediately upon finding the ammunition, the agents began questioning defendant about the weapon which logically accompanied it. It was as a direct result of this questioning that mention was first made of a car at LaGuardia Airport. Although defendant later admitted fabricating much of his story to delay his being jailed, it was this information which, together with the keys and bill of sale, led the agents to the weapons. The government's unelaborated allusion to indipendent information was insufficient under Parontian, supra., to cleanse the evidence ot its taint. The evidence should have been excluded, and its admission was reversible error.

II. THE COURT ERRED BY REFUSING TO SUPPRESS EVIDENCE PRODUCED BY THE SEARCH OF DEFENDANT'S AUTOMOBILE WHICH, QUITE APART FROM THE SEARCH AT THE MOTEL, WAS ITSELF UNLAWFUL.

A. The search of defendant's car was not justified as incident to his arrest.

It is well established that for the search of a car to be incident to an arrest, it must be within defendant's scope of control at the precise time and place of the arrest. Preston V. United States , 376 U.S. 364 (1964); Dyke V. Taylor Implement Manufacturing Company, 391 U.S. 216 (1968). A search conducted, as in the instant case, a day after and miles away from the situs of the arrest can hardly be claimed to be incident to that arrest.

B. The search of defendant's car was not within the recognized exception for automobiles because it was not reasonably necessary to prevent the destruction or removal of evidence.

The automobile exception was first stated in Carroll V. United States, 67 U.S. 132 (1925). That case concerned the search of a moving vehicle on the open highway justified solely by the extreme danger that the contraband sought would be destroyed before a warrant could be obtained. This reasoning has been refined by the Supreme Court in Coolidge V. New Hampshire, 403 U.S. 443 (1971) to apply only where there is a real possibility that the vehicle will be moved or evidence destroyed before a warrant can be obtained. While stressing that, where the defendant is already in police custody, the exigent circumstances supporting special treatment of automobile searches are lacking, see,e.g. Preston, supra., the Court noted that a reasonable fear that confederates will have access to the car brings the search within the Carroll rule even after the defendant's arrest. 403 U.S. at 461 n.18.

Assuming that reasonable fear that the car will be moved is the appropriate standard, in the instant case no such reasonable fear existed. The FBI had in its custody all known parties to the crimes charged in the fugitive warrants. Despite isolated mention of a third participant, the only evidence that such a person existed adduced at the

trial was Mary Tracy's testimony that three (3) months earlier in Virginia defendant knew such a person. Given the absence of probable cause to believe that anyone else having access to the car remained at large, there appears no basis for any fear that the car would be removed.

Further, the very fact that the FBI did not act to locate the car until the next day illustrates quite clearly the absence of any such fear. Thus, despite their possession of the bill of sale fully describing the car and giving its serial number and the ease with which a warrant could have been obtained in the time between arrest and search, the FBI made no attempt to do so. Under these circumstances to allow this failure to be justified solely on the grounds that it was an automobile which was searched rather than a dwelling makes a mockery of the reasoning underlying the exception and does severe damage to Fourth Amendment guarantees. Coolidge, supra., at 461-62.

Nor does Chambers V. Maroney, 399 U.S. 42 (1970) compel a different result. In that case defendant was arrested in his car shortly after an armed robbery. At the station, the car was searched and several guns were found. Execution of a search warrant at defendant's home produced ammunition for the gun. The evidence provided by both searches

was used at trial and defendant was convicted. The Supreme Court held the search of the car to have been lawful. As has been noted, however, this case is reconcilable with Coolidge, supra., because of the special facts involved. See Note, Warrantless Searches and Seizures of Automobiles, 87 Harvard Law Review 835, 843-45 (1974). The defendant in Chambers, supra., was stopped on the road which, under Carroll supra., justified a warrantless search at that time. To hold that search of the very same car subsequent to arrest of its driver was unalwful seemed to the Court to create a senseless distinction. In the instant case,however, a warrantless search of defendant Cepulonis' car prior to his arrest would have been on less unlawful than was its later search. This same conclusion was reached with respect to a stationary car in United States V. Cohen, 358 F.Supp. 112,123 (S.D.N.Y.,1973).

Inopposite as well is Cady V. Dombrowski, 413 U.S. 433 (1973). In Cady, defendant's disabled car had been towed to the police station after an accident in which defendant was arrested for drunk driving. Defendant identified himself as an off-duty policeman who the arresting officer believed was required to carry a revolver at all times. Having found no gun on defendant, the officer inspected the car and in so doing, found bloody implements which led to the discovery of a murder committed by the

defendant. In upholding the lawfulness of the car search, the Court stresses the police custody over the disabled car, the inadvertence with which the incriminating evidence had been found and the acceptability as an alternative to posting guard in a rural setting of the search as a way of protecting the public against the chance that an intruder would find the gun. The case was deemed to be controlled by Harris V. United States, 390 U.S. 234 (1968), another instance in which evidence unearthed inadvertently in the course of a proper impoundment was held constitutionally admissible.

Clearly, none of these factors is relevant to the instant case. The FBI did not have custody over defendant's car, the search was specifically directed at locating the machine guns and was in no way an inadvertent adjunct to other proper activities, and less constitutionally objectionable means were available to prev ent intermeddling with the car until a warrant was obtained. Cady, supra., thus provides no support for the trial judge's finding that the search was lawful.

Richard A. Cepulonis

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